

NO. 48933-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

AARON TROTTER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael Evans, Judge

BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
1. THE JURY INSTRUCTION, “A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS,” UNCONSTITUTIONALLY DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED	2
a. <u>WPIC 4.01’s articulation requirement misstates the reasonable doubt standard, shifts the burden of proof, and undermines the presumption of innocence</u>	3
b. <u>No appellate court in recent times has directly grappled with the challenged language in WPIC 4.01</u>	13
c. <u>WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which a reason exists with a doubt for which a reason can be given</u>	15
d. <u>This structural error requires reversal</u>	20
2. APPEAL COSTS SHOULD NOT BE IMPOSED	22
D. <u>CONCLUSION</u>	23

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Anfinson v. FedEx Ground Package Sys., Inc.</u> 174 Wn.2d 851, 281 P.3d 289 (2012).....	5
<u>Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1</u> 124 Wn.2d 816, 881 P.2d 986 (1994)	14
<u>In re Electric Lightwave, Inc.</u> 123 Wn.2d 530, 869 P.2d 1045 (1994)	14
<u>Johnson v. Dep't of Fish & Wildlife</u> 175 Wn. App. 765, 305 P.3d 1130 (2013)	5, 9
<u>State v. Anderson</u> 153 Wn. App. 417, 220 P.3d 1273 (2009) <u>review denied</u> , 170 Wn.2d 1002 (2010)	9
<u>State v. Bennett</u> 161 Wn.2d 303, 165 P.3d 1241 (2007).....	8, 12, 13, 14, 21
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015).....	22
<u>State v. Borsheim</u> 140 Wn. App. 357, 165 P.3d 417 (2007)	10
<u>State v. Dana</u> 73 Wn.2d 533, 439 P.2d 403 (1968).....	3, 11
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	9, 13, 14, 18, 19
<u>State v. Harras</u> 25 Wash. 416, 65 P. 774 (1901)	17, 19
<u>State v. Harsted</u> 66 Wash. 158, 119 P. 24 (1911)	18, 19

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Johnson</u>	
158 Wn. App. 677, 243 P.3d 936 (2010)	
<u>review denied</u> , 171 Wn.2d 1013 (2011)	9
 <u>State v. Kalebaugh</u>	
183 Wn.2d 578, 355 P.3d 253 (2015).....	11, 13, 14, 18, 19
 <u>State v. LeFaber</u>	
128 Wn.2d 896, 913 P.2d 369 (1996).....	4, 10
 <u>State v. Lizarraga</u>	
191 Wn. App. 530, 364 P.3d 810 (2015).....	21
 <u>State v. Nabors</u>	
8 Wn. App. 199, 505 P.2d 162 (1973).....	16
 <u>State v. Noel</u>	
51 Wn. App. 436, 753 P.2d 1017 (1988).....	4
 <u>State v. O'Hara</u>	
167 Wn.2d 91, 217 P.3d 756 (2009).....	4
 <u>State v. Paumier</u>	
176 Wn.2d 29, 288 P.3d 1126 (2012).....	20
 <u>State v. Pirtle</u>	
127 Wn.2d 628, 904 P.2d 245 (1995).....	21
 <u>State v. Simon</u>	
64 Wn. App. 948, 831 P.2d 139 (1991)	
<u>rev'd on other grounds</u> , 120 Wn.2d 196, 840 P.2d 172 (1992)	3
 <u>State v. Sinclair</u>	
192 Wn. App. 380, 367 P.3d 612	
<u>review denied</u> , 85 Wn.2d 1034 (2016)	22
 <u>State v. Smith</u>	
174 Wn. App. 359, 298 P.3d 785	
<u>review denied</u> , 178 Wn.2d 1008, 308 P.3d 643 (2013)	4

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Tanzymore</u> 54 Wn.2d 290, 340 P.2d 178 (1959).....	16
<u>State v. Thompson</u> 13 Wn. App. 1, 533 P.2d 395 (1975).....	15, 16, 17
<u>State v. Venegas</u> 155 Wn. App. 507, 228 P.3d 813 <u>review denied</u> , 170 Wn.2d 1003 (2010)	9
<u>State v. Watkins</u> 136 Wn. App. 240, 148 P.3d 1112 (2006).....	10
<u>State v. Walker</u> 164 Wn. App. 724, 265 P.3d 191 (2011) <u>review granted</u> 175 Wn.2d 1022 (2012)	9
 <u>FEDERAL CASES</u>	
<u>In re Winship</u> 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	6, 8
<u>Jackson v. Virginia</u> 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	5
<u>Johnson v. Louisiana</u> 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972).....	5
<u>Sandstrom v. Montana</u> 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).....	5
<u>Sullivan v. Louisiana</u> 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).....	20
<u>United States v. Johnson</u> 343 F.2d 5 (2d Cir. 1965)	5

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>OTHER JURISDICTIONS</u>	
<u>Butler v. State</u> 78 N.W. 590 (Wis. 1899).....	19
<u>Siberry v. State</u> 33 N.E. 681 (Ind. 1893)	12
<u>State v. Cohen</u> 78 N.W. 857 (Iowa 1899)	12
<u>State v. Jefferson</u> 43 La. Ann. 995, 10 So. 119 (La. 1891)	17
<u>State v. Morey</u> 25 Or. 241, 36 P. 573 (1894)	17
<u>Vann v. State</u> 9 S.E. 945 (Ga. 1889)	17
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01 (3d ed. 2008)	<i>Passim</i>
Steve Sheppard, <u>he Metamorphoses of Reasonable Doubt: How Changes in the Burden</u> <u>of Proof Have Weakened the Presumption of Innocence</u> 78 NOTRE DAME L. REV. 1165 (2003).....	8
RAP 2.5.....	20
RAP 14.....	21
RCW 10.73.160	22
U.S. CONST. amend. VI.....	3, 20

TABLE OF AUTHORITIES (CONT'D)

	Page
U.S. CONST. amend. XIV	3, 20
CONST. art. I, § 3	3
CONST. art. I, § 22	3
WEBSTER'S THIRD NEW INT'L DICTIONARY 1892 (1993).....	5, 6

A. ASSIGNMENT OF ERROR

Washington's pattern jury instruction on reasonable doubt is unconstitutional.

Issue Pertaining to Assignment of Error

Did the reasonable doubt instruction, stating a "reasonable doubt is one for which a reason exists," misdescribe the burden of proof, undermine the presumption of innocence, and shift the burden to appellant to provide a reason for why reasonable doubt exists?

B. STATEMENT OF THE CASE

The Cowlitz county prosecutor charged appellant Aaron Trotter with one count each of second degree assault by strangulation and second degree assault with a deadly weapon for an incident that occurred on May 31, 2015. CP 4-5. A jury found Trotter not guilty of second degree assault by strangulation, and failed to reach a verdict on the second degree assault with a deadly weapon, during the first trial. CP 34-35.

A jury found Trotter of second degree assault with a deadly weapon during a subsequent trial. CP 63; RP 254-55. The jury also returned special verdicts, finding that found Trotter was armed with a firearm during the assault, and that he and the complaining witness were members of the same family or household. CP 64-65.

Based on an offender score of zero, the trial court imposed 3 months imprisonment. CP 66-77; RP¹ 279. The trial court also imposed a 36 month firearm enhancement for a total prison term of 39 months. CP 66-77; 279. The court also imposed 18 months of community custody. CP 71; RP 280. The trial court waived all non-mandatory legal financial obligations (LFOs). CP 72; RP 280. Trotter timely appeals. CP 78-79.

C. ARGUMENT

1. THE JURY INSTRUCTION, “A REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS,” UNCONSTITUTIONALLY DISTORTS THE REASONABLE DOUBT STANDARD, UNDERMINES THE PRESUMPTION OF INNOCENCE, AND SHIFTS THE BURDEN OF PROOF TO THE ACCUSED

Trotter’s jury was instructed, “A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.” CP 46 (instruction 3) (emphasis added); RP 205. This instruction, based on WPIC 4.01,² is constitutionally defective for two related reasons.

First, it tells jurors they must be able to articulate a reason for having a reasonable doubt, either to themselves or to fellow jurors. This engrafts an additional requirement onto reasonable doubt. Not only must

¹ RP refers to the verbatim report of proceedings of March 30, 31, and May 3, 2016.

² 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at 85 (3d ed. 2008).

jurors have a reasonable doubt, they must also have an articulable doubt. This makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions.

Second, telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence and is substantively identical to fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring the same exact thing.

WPIC 4.01 violates due process and the jury-trial guarantee. U.S. CONST. amends. VI, XIV; CONST. art. I, §§ 3, 22. Instructing jurors with WPIC 4.01 is structural error and requires reversal.

- a. WPIC 4.01's articulation requirement misstates the reasonable doubt standard, shifts the burden of proof, and undermines the presumption of innocence.

Jury instructions must be “readily understood and not misleading to the ordinary mind.” State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). “The rules of sentence structure and punctuation are the very means by which persons of common understanding are able to ascertain the meaning of written words.” State v. Simon, 64 Wn. App. 948, 958, 831 P.2d 139 (1991), rev'd on other grounds, 120 Wn.2d 196, 840 P.2d

172 (1992). In examining how an average juror would interpret an instruction, appellate courts look to the ordinary meaning of words and rules of grammar. See, e.g., State v. LeFaber, 128 Wn.2d 896, 902-03, 913 P.2d 369 (1996) (proper grammatical reading of self-defense instruction allowed jury to find actual imminent harm was necessary for self defense, resulting in court's determination that jury could have applied erroneous self defense standard), overruled in part on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009); State v. Noel, 51 Wn. App. 436, 440-41, 753 P.2d 1017 (1988) (relying on grammatical structure of unanimity instruction to determine ordinary reasonable juror would read clause to mean jury must unanimously agree upon same act); State v. Smith, 174 Wn. App. 359, 366-68, 298 P.3d 785 (discussing difference between use of "should" and use of word indicating "must" regarding when acquittal is appropriate), review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013).

The error in WPIC 4.01 is obvious to any English speaker. Having a "reasonable doubt" is not, as a matter of plain English, the same as having a reason to doubt. But WPIC 4.01 requires both for a jury to return a not guilty verdict. A basic examination of the meaning of the words "reasonable" and "a reason" reveals this grave flaw in WPIC 4.01.

Appellate courts consult the dictionary to determine the ordinary meaning of language used in jury instructions. See, e.g., Sandstrom v. Montana, 442 U.S. 510, 517, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) (looking to dictionary definition of “presume” to determine how jury may have interpreted instruction); Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 874-75, 281 P.3d 289 (2012) (turning to dictionary definition of “common” to ascertain the jury’s likely understanding of the word in instruction).

“Reasonable” is defined as “being in agreement with right thinking or right judgment : not conflicting with reason : not absurd : not ridiculous . . . being or remaining within the bounds of reason . . . having the faculty of reason : RATIONAL . . . possessing good sound judgment . . .” WEBSTER’S THIRD NEW INT’L DICTIONARY 1892 (1993). For a doubt to be reasonable under these definitions it must be rational, logically derived, and have no conflict with reason. See Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (“A ‘reasonable doubt,’ at a minimum, is one based upon ‘reason.’”); Johnson v. Louisiana, 406 U.S. 356, 360, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972) (collecting cases defining reasonable doubt as one “‘based on reason which arises from the evidence or lack of evidence’”) (quoting United States v. Johnson, 343 F.2d 5, 6, n.1 (2d Cir. 1965)).

Thus, an instruction defining reasonable doubt as “a doubt based on reason” would be proper. WPIC 4.01 does not do that, however. WPIC 4.01 requires “a reason” for the doubt, which is different than a doubt based on reason.

The placement of the article “a” before “reason” in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt. “[A] reason” in the context of WPIC 4.01, means “an expression or statement offered as an explanation of a belief or assertion or as a justification.” WEBSTER’S, supra, at 1891. In contrast to definitions employing the term “reason” in a manner that refers to a doubt based on reason or logic, WPIC 4.01’s use of the words “a reason” indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable, reasonable doubt.

Due process “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Washington’s pattern instruction on reasonable doubt is unconstitutional because its language requires more than just a reasonable doubt to acquit. It instead explicitly requires a justification or explanation for why reasonable doubt exists.

Under the current instruction, jurors could have reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable. A case might present such voluminous and contradictory evidence that jurors having legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. Yet, despite reasonable doubt, acquittal would not be an option. Scholarship on the reasonable doubt standard elucidates similar concerns with requiring jurors to articulate their doubt:

An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.

One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.

A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in

which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003) (footnotes omitted). In these various scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable doubt. Because the State will avoid supplying a reason to doubt in its own prosecutions, WPIC 4.01 requires that the defense or the jurors supply a reason to doubt, shifting the burden and undermining the presumption of innocence.

The beyond-a-reasonable-doubt standard enshrines and protects the presumption of innocence, "that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." Winship, 397 U.S. at 363. The presumption of innocence, however, "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." State v. Bennett, 161 Wn.2d 303, 316, 165 P.3d 1241 (2007). The "doubt for which a reason exists" language in WPIC 4.01 does just that by directing jurors they must have a reason to acquit rather than a doubt based on reason.

In prosecutorial misconduct cases, appellate courts have consistently condemned arguments that jurors must articulate a reason for having reasonable doubt. Fill-in-the-blank arguments “improper impl[y] that the jury must be able to articulate its reasonable doubt” and “subtly shift[] the burden to the defense.” State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); accord State v. Walker, 164 Wn. App. 724, 731, 265 P.3d 191 (2011), review granted 175 Wn.2d 1022 (2012); State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013 (2011); State v. Venegas, 155 Wn. App. 507, 523-24 & n.16, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010). These arguments are improper “because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence.” Emery, 174 Wn.2d at 759. Simply put, “a jury need do nothing to find a defendant not guilty.” Id.

These improper burden shifting arguments are not the mere product of prosecutorial malfeasance, however. The offensive arguments did not originate in a vacuum but sprang directly from WPIC 4.01’s language. In Anderson, for instance, the prosecutor recited WPIC 4.01 before arguing, “in order to find the defendant not guilty, you have to say, ‘I don’t believe the defendant is guilty because,’ and then you have to fill

in the blank.” 153 Wn. App. at 424. In Johnson, likewise, the prosecutor told jurors “What [WPIC 4.01] says is ‘a doubt for which a reason exists.’ In order to find the defendant not guilty, you have to say, ‘I doubt the defendant is guilty and my reason is’ To be able to find a reason to doubt, you have to fill in the blank; that’s your job.” 158 Wn. App. at 682.

If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the same undermining to occur through a jury instruction. The misconduct cases make clear that WPIC 4.01 is the true culprit. Its doubt “for which a reason exists” language provides a natural and seemingly irresistible basis to argue that jurors must give a reason why there is reasonable doubt in order to have reasonable doubt. If trained legal professionals mistakenly believe WPIC 4.01 means reasonable doubt does not exist unless jurors are able to provide a reason why it does exist, then how can average jurors be expected to avoid the same hazard?

Jury instructions “‘must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.’” State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d

1112 (2006)). An ambiguous instruction that permits erroneous interpretation of the law is improper. LeFaber, 128 Wn.2d at 902. Even if it is possible for an appellate court to interpret the instruction in a manner that avoids constitutional infirmity—which Trotter does not concede—that is not the correct standard for measuring the adequacy of jury instructions. Courts have arsenals of interpretative aids at their disposal whereas jurors do not. Id.

WPIC 4.01 fails to make it manifestly clear that jurors need not be able to give a reason for why reasonable doubt exists. Far from making the proper reasonable doubt standard manifestly apparent to the average juror, WPIC 4.01’s infirm language affirmatively misdirects the average juror into believing a reasonable doubt cannot exist unless and until a reason for it can be articulated. Instructions must not be “misleading to the ordinary mind.” Dana, 73 Wn.2d at 537. WPIC 4.01 is readily capable of misleading the average juror into thinking that acquittal depends on whether a reason for reasonable doubt can be stated. The plain language of the instruction, and the fact that legal professionals have been misled by the instruction in this manner, compels this conclusion.

In State v. Kalebaugh, the Washington Supreme Court held a trial court’s preliminary instruction that a reasonable doubt is “a doubt for which a reason can be given” was erroneous because “the law does not

require that a reason be given for a juror's doubt." 183 Wn.2d 578, 585, 355 P.3d 253 (2015). This conclusion is sound:

Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.

State v. Cohen, 78 N.W. 857, 858 (Iowa 1899); see also Siberry v. State, 33 N.E. 681, 684-85 (Ind. 1893) (criticizing instruction "a reasonable doubt is such a doubt as the jury are able to give reason for" because it "puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty which the law requires before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case"). Yet there is little difference between a reason that "can be given" and a reason that merely exists—both definitions of reasonable doubt require an articulable reason for why the jury has reasonable doubt.

- b. No appellate court in recent times has directly grappled with the challenged language in WPIC 4.01.

Recently, this Court rejected a challenge to WPIC 4.01 because Bennett directed trial courts to use the pattern instruction. State v. Parnel, 195 Wn. App. 325, ___ P.3d ___, 2016 WL 4126013 *2 (2016) (citing Bennett, 161 Wn.2d at 317-18), petition for review pending, (No. 93534-5). But Bennett did not address a direct challenge to WPIC 4.01 and therefore does not fairly resolve the dispute at issue here and in Parnel.

In Bennett, the Washington Supreme Court directed trial courts to give WPIC 4.01, at least “until a better instruction is approved.” 161 Wn.2d at 318. The Bennett court clearly signaled that WPIC 4.01 has room for improvement. This is undoubtedly true given WPIC 4.01’s repugnant articulation requirement.

In Emery, the court contrasted the “proper description” of reasonable doubt as a “doubt for which a reason exists” with the improper argument that the jury must be able to articulate its reasonable doubt by filling in the blank. Emery, 174 Wn.2d at 759. In Kalebaugh, the court similarly contrasted “the correct jury instruction that a ‘reasonable doubt’ is a doubt for which a reason exists” with an improper instruction that “a reasonable doubt is ‘a doubt for which a reason can be given.’” 183 Wn.2d at 585. The Kalebaugh court concluded the trial court’s erroneous

instruction—“a doubt for which a reason can be given”—was harmless, accepting Kalebaugh’s concession at oral argument “that the judge’s remark ‘could live quite comfortably’ with the final instructions given here.” Id.

The court’s recognition that the instruction “a doubt for which a reason can be given” can “live quite comfortably” with WPIC 4.01’s language amounts to a tacit acknowledgment that WPIC 4.01 is readily interpreted to require the articulation of a reasonable doubt. Jurors are undoubtedly interpreting WPIC 4.01 as requiring them to give a reason for their doubt. The plain language of WPIC 4.01 requires this articulation. No Washington court has ever explained how this is not so.

Kalebaugh provided no answer, as appellate counsel conceded the correctness of WPIC 4.01 in that case. In fact, none of the appellants in Kalebaugh, Emery, or Bennett argued the doubt “for which a reason exists” language in WPIC 4.01 misstates the reasonable doubt standard. “In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised.” Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994); accord In re Electric Lightwave, Inc. 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) (“We do not rely on cases that fail to specifically raise or decide an issue.”).

While Kalebaugh and Bennett might be read to tacitly approve WPIC 4.01, neither of the petitioners in those cases argued the “one for which a reason exists” language in WPIC 4.01 misstated the reasonable doubt standard. Because WPIC 4.01 was not challenged on appeal in those cases, the analysis in each flows from the unquestioned premise that WPIC 4.01 is correct. As such, their approval of WPIC 4.01’s language does not control.

- c. WPIC 4.01 rests on an outdated view of reasonable doubt that equated a doubt for which a reason exists with a doubt for which a reason can be given.

Forty years ago, Division Two addressed an argument that “[t]he doubt which entitled the defendant to an acquittal must be a doubt for which a reason exists’ (1) infringes upon the presumption of innocence, and (2) misleads the jury because it requires them to assign a reason for their doubt, in order to acquit.” State v. Thompson, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (quoting jury instruction). Thompson brushed aside the articulation argument in one sentence, stating “the particular phrase, when read in the context of the entire instruction does not direct the jury to assign a reason for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary.” Thompson, 13 Wn. App. at 5.

Thompson's cursory statement is untenable. The first sentence on the meaning of reasonable doubt plainly requires a reason to exist for reasonable doubt. The instruction directs jurors to assign a reason for their doubt and no further "context" erases the taint of this articulation requirement. The Thompson court did not explain what "context" saved the language from constitutional infirmity. Its suggestion that the language "merely points out that [jurors'] doubts must be based on reason" fails to account for the obvious difference in meaning between a doubt based on "reason" and a doubt based on "a reason." Thompson wished the problem away by judicial fiat rather than confront the problem through thoughtful analysis.

The Thompson court began its discussion by recognizing "this instruction has its detractors" but noted it was "constrained to uphold it" based on State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178 (1959), and State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973). Thompson, 13 Wn. App. at 5.

In holding the trial court did not err in refusing the defendant's proposed instruction on reasonable doubt, Tanzymore simply stated that the standard instruction "has been accepted as a correct statement of the law for so many years" that the defendant's argument to the contrary was without merit. State v. Tanzymore, 54 Wn.2d 290, 291, 340 P.2d 178

(1959). Nabors cites Tanzymore as its support. Nabors, 8 Wn. App. at 202. Neither case specifically addressed the “doubt for which a reason exists” language in the instruction, so it was not at issue.

The Thompson court observed “[a] phrase in this context has been declared satisfactory in this jurisdiction for over 70 years,” citing State v. Harras, 25 Wash. 416, 65 P. 774 (1901). Thompson, 13 Wn. App. at 5. Harras found no error in the following language: “It should be a doubt for which a good reason exists,—a doubt which would cause a reasonable and prudent man to hesitate and pause in a matter of importance, such as the one you are now considering.” Harras, 25 Wash. at 421. Harras simply maintained the “great weight of authority” supported it, citing the note to Burt v. State, 48 Am. St. Rep. 574, 16 So. 342 (Miss. 1894). However, this note cites non-Washington cases using or approving instructions that define reasonable doubt as a doubt for which a reason can be given.³

³ See, e.g., State v. Jefferson, 43 La. Ann. 995, 998-99, 10 So. 119 (La. 1891) (“A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or substantial doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give a good reason for.”); Vann v. State, 9 S.E. 945, 947-48 (Ga. 1889) (“But the doubt must be a reasonable doubt, not a conjured-up doubt,—such a doubt as you might conjure up to acquit a friend, but one that you could give a reason for.”); State v. Morey, 25 Or. 241, 255-59, 36 P. 573 (1894) (“A reasonable doubt is a doubt which has some reason for its basis. It does not mean a doubt from mere caprice, or groundless conjecture. A reasonable doubt is such a doubt as a juror can give a reason for.”).

So our supreme court in Harras viewed its “a doubt for which a good reason exists” instruction as equivalent to those instructions requiring a reason to be given for the doubt. And then Thompson upheld the doubt “for which a reason exists” instruction by equating it with the instruction in Harras. Thompson did not grasp the ramifications of this equation, as it amounts to a concession that WPIC 4.01’s doubt “for which a reason exists” language means a doubt for which a reason can be given. This is a serious problem because, under current jurisprudence, any suggestion that jurors must be able to give a reason for why reasonable doubt exists is improper. Kalebaugh, 183 Wn.2d at 585; Emery, 174 Wn.2d at 759-60. The Kalebaugh court explicitly held, moreover, that it was a manifest constitutional error to instruct the jury that reasonable doubt is “a doubt for which a reason can be given.” 183 Wn.2d at 584-85.

State v. Harsted, 66 Wash. 158, 119 P. 24 (1911), sheds further light on this dilemma. Harsted took exception to the instruction, “The expression, ‘reasonable doubt’ means in law just what the words imply—a doubt founded upon some good reason.” Id. at 162. The court explained the meaning of reasonable doubt:

[I]f it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. As a pure question of logic,

there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given.

Id. at 162-63. In support of its holding that there was nothing wrong with the challenged language, the Harsted court cited a number of out-of-state cases upholding instructions defining a reasonable doubt as a doubt for which a reason can be given. Id. at 164. Among them was Butler v. State, 78 N.W. 590, 591-92 (Wis. 1899), which stated, “A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given.” While the Harsted court noted some courts had disapproved of similar language, it was “impressed” with the view adopted by the other cases it cited and felt “constrained” to uphold the instruction. 66 Wash. at 165.

We now arrive at the genesis of the problem. More than 100 years ago, the Washington Supreme Court in Harsted and Harras equated two propositions in addressing the standard instruction on reasonable doubt: a doubt for which a reason exists means a doubt for which a reason can be given. This revelation annihilates any argument that there is a real difference between a doubt “for which a reason exists” in WPIC 4.01 and being able to give a reason for why doubt exists. Our supreme court found no such distinction in Harsted and Harras.

This problem has continued unabated to the present day. There is an unbroken line from Harras to WPIC 4.01. The root of WPIC 4.01 is rotten. Emery and Kalebaugh condemned any suggestion that jurors must give a reason for having reasonable doubt. Yet Harras and Harsted explicitly contradict Emery's and Kalebaugh's condemnation. The law has evolved, and what was acceptable 100 years ago is now forbidden. But WPIC 4.01 remains stuck in the past, outpaced by this court's modern understanding of the reasonable doubt standard and swift eschewal of any articulation requirement.

It is time for a Washington appellate court to seriously confront the problematic language in WPIC 4.01. There is no appreciable difference between WPIC 4.01's doubt "for which a reason exists" and the erroneous doubt "for which a reason can be given." Both require a reason for why reasonable doubt exists. This requirement distorts the reasonable doubt standard to the detriment of the accused.

d. This structural error requires reversal

Defense counsel did not object to the instruction at issue here. See RP 132 (no exceptions to jury instructions). However, the error may be raised for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5(a)(3). Structural errors qualify as

manifest constitutional errors for RAP 2.5(a)(3) purposes. State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012).

The failure to properly instruct the jury on reasonable doubt is structural error requiring reversal without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury trial guarantee. Id. at 279-80. Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates all the jury's findings." Id. at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" Id. at 281-82.

WPIC 4.01's language requires more than just a reasonable doubt to acquit; it requires an articulable doubt. Its articulation requirement undermines the presumption of innocence, shifts the burden of proof, and misinstructs jurors on the meaning of reasonable doubt. The trial court's use of WPIC 4.01 was structural error and requires reversal of Trotter's conviction and a new trial.⁴

⁴ In State v. Lizarraga, 191 Wn. App. 530, 567, 364 P.3d 810 (2015), Division One upheld WPIC 4.01 against a challenge that it undermined the presumption of innocence and burden of proof. In doing so, this court merely cited Bennett and State v. Pirtle, 127 Wn.2d 628, 656-58, 904 P.2d

2. APPEAL COSTS SHOULD NOT BE IMPOSED

The trial court found Trotter was entitled to seek review at public expense, and therefore appointed appellate counsel. CP 80-84. If Trotter does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. State v. Sinclair, 192 Wn. App. 380, 389-90, 367 P.3d 612 (recognizing it is appropriate for this court to consider appellate costs when the issue is raised in the appellant's brief). RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . . to pay appellate costs." (Emphasis added.) Under RCW 10.73.160(1), this Court has ample discretion to deny the State's request for costs. Sinclair, 192 Wn. App. at 388.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly, Trotter's ability to pay must be determined before

245 (1995). Lizarraga, 191 Wn. App. at 567. As discussed above, however, Bennett does not dispose of these arguments. Nor does Pirtle, which merely dealt with a challenge to the last sentence of WPIC 4.01, which provided that, if jurors did not have an "abiding belief" in the truth of the charge, they were not satisfied beyond a reasonable doubt. Pirtle, 127 Wn.2d at 656-58.

discretionary costs are imposed. The trial court made no such finding. Instead, the trial court waived all non-mandatory fees. CP 72; RP 280.

Without a basis to determine that Trotter has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

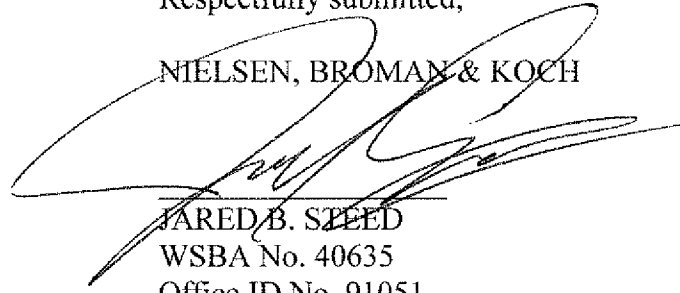
D. CONCLUSION

Trotter asks that this court reverse his conviction and remand for a new trial because the trial court gave a constitutionally deficient instruction on reasonable doubt. This Court should also exercise its discretion and deny appellate costs.

DATED this 31st day October, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED
WSBA No. 40635
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC

October 31, 2016 - 9:16 AM

Transmittal Letter

Document Uploaded: 7-489333-Appellant's Brief.pdf

Case Name: Aaron Trotter

Court of Appeals Case Number: 48933-3

Is this a Personal Restraint Petition? Yes ☐ No ☒

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

☒ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Copy sent to : Aaron Trotter 3232 Rose Valley Rd Kelso, WA 98626

Sender Name: John P Sloane - Email: sloanej@nwattorney.net

A copy of this document has been emailed to the following addresses:

Jurvakainen.ryan@co.cowlitz.wa.us

Appeals@co.cowlitz.wa.us

steadj@nwattorney.net